

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

DUDE BREITBARTH,

Plaintiff,

v.

COMMISSIONER, SOCIAL SECURITY
ADMINISTRATION,

Defendant.

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Case No. 6:19-CV-93-JDK-JDL

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

Plaintiff Dude Breitbarth filed this action pursuant to the Social Security Act of 1935 § 205(g), 42 U.S.C. § 405(g) (2012), seeking judicial review of the denial of his application for Social Security benefits by Defendant Commissioner of the Social Security Administration. Docket No. 1. Before initiating this action, Plaintiff requested review of the ALJ's decision, which was denied by the Appeals Council on November 30, 2018. Docket Nos. 8 at 2; 8-1, Ex. 1, at 3. The case was referred to United States Magistrate Judge John D. Love pursuant to 28 U.S.C. § 636.

On September 11, 2019, the Magistrate Judge issued a Report and Recommendation recommending that the Commissioner's Motion for Summary Judgment or Alternatively, Motion to Dismiss (Docket No. 8) be granted (Docket No. 9). Specifically, the Magistrate Judge recommended that the action be dismissed without prejudice as untimely because Plaintiff did not initiate the action within 60 days of receiving presumptive notice of the Appeals Council's denial of his request for review. Docket No. 9 at 2–3. The parties were served with the Report and Recommendation through their counsel of record via the Court's

CM/ECF electronic filing system on September 11, 2019. Docket No. 9.

The Report and Recommendation informed the parties of their right to object within 14 days, and further informed them that a “party’s failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen (14) days after being served with a copy shall bar that party from de novo review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court.” Docket No. 9 at 3 (citing *Douglass v. United States Auto. Ass’n*, 79 F.3d 1415, 1430 (5th Cir. 1996)).


Plaintiff timely filed an objection and asked the Court not to adopt the Report and Recommendation due to “a pending request for an extension from the Appeals Council.” Docket No. 10 at 1. The Magistrate Judge thereafter ordered the Commissioner to file a response, which the Commissioner did, along with the declaration of Janay Podraza, Acting Chief of Court Case Preparation Branch 4, Office of Appellate Operations, who stated that Plaintiff has no appeal pending with the Appeals Council. Docket No. 12-1 at 3–4.

The Court reviews objected-to portions of the Magistrate Judge’s Report and Recommendation de novo. *See* FED. R. CIV. P. 72; 28 U.S.C. § 636(b)(1). A court conducting a de novo review examines the entire record and makes an independent assessment under the law. *Douglass*, 79 F.3d at 1430. Having reviewed the Magistrate Judge’s Report and Recommendation and the response filed by the Commissioner, the Court finds that Plaintiff’s objection has no basis in fact and is therefore without merit. Docket No. 12-1 at 3–4.

Having made a de novo review of the objected-to portions of the Report and

Recommendation (Docket No. 9), the Court finds that Plaintiff's objection (Docket No. 10) should be **OVERRULED** and the Magistrate Judge's Report (Docket No. 9) should be **ADOPTED**. It is accordingly **ORDERED** that Defendant's Motion (Docket No. 8) be **GRANTED** and Plaintiff's claim is **DISMISSED WITHOUT PREJUDICE**.

So **ORDERED** and **SIGNED** this **15th** day of **October, 2019**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE